RAJESH DATUK YUSOF

v.

DIRECTOR OF LANDS AND SURVEYS, SABAH & ANOR

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT J
[ORIGINATING SUMMONS NO: T(24) 33-2003]
26 SEPTEMBER 2005

ADMINISTRATIVE LAW: *Exercise of administrative powers - Application for land by applicant and others - Whether state authority may impose additional conditions not set out in land title - Whether exercise of a power not expressly provided in Land Ordinance and Land Rules ultra vires and void - Sabah Land Ordinance (Cap 68) s. 9(1)*

LIMITATION: *Government proceedings - Actions against public authorities - Whether asking for declaration that decision of public authority is ultra vires amounts to action against public authority - Whether Public Authorities Protection Act 1948 applies*

LIMITATION: *Laches, doctrine of - Delay of 5 years in applying for declaration that decision of public authority is ultra vires - Whether fatal*

The plaintiff, a successful land applicant, applied to the court for a declaration that the decision of the 1st defendant ordering the plaintiff to compensate the 2nd defendant, an unsuccessful land applicant, and the subsequent decisions of the 1st defendant to withhold registration of the draft title of the land successfully applied for in favour of the plaintiff until payment by the plaintiff of compensation amounting to RM900,000 to the 2nd defendant were unlawful and *void ab initio*. The 2nd defendant relied on s. 2 of the Public Authorities Protection Act 1948. It was claimed that the plaintiff was also guilty of laches since the application was made five years after the impugned decision.

Held (allowing the relief asked for with costs):

[1] The first decision did not make the payment of compensation to the 2nd defendant a condition precedent to the registration of the title in favour of the plaintiff. Hence, the second decision to the effect that registration be withheld pending payment was not only manifestly unfounded but also totally at odds with the first decision. (p. 569 a)

[2] The condition relating to compensation to the 2nd defendant was not set out in the title which had since been issued and registered in the name of the plaintiff. The 1st defendant was not clothed with the power to

impose that condition. Such a condition stemming as it did from the exercise of a power not expressly provided for would be *ultra vires* the Sabah Land Ordinance and the Land Rules and therefore void. The provisions of the Sabah Land Ordinance and the Land Rules setting out the powers of the 1st defendant are exhaustive and exclusive. The exercise of a power not expressly provided in the Sabah Land Ordinance and the Land Rules would therefore be void. (p. 569 d-e & h)

[3] The plaintiff was not instituting an action against the act or omission of the 1st defendant and consequential damages therefrom. What the plaintiff asked for was a declaration by the court that the decision complained of was *ultra vires* the Sabah Land Ordinance 1960. Clearly the Public Authorities Protection Act 1948 did not apply. (p. 570 d)

[4] The delay of five years was not fatal because here the impugned decision was non-existent; it was a nullity and *void ab initio*. (p. 571 h)

Case(s) referred to:
Datuk Syed Kechik Syed Mohamad v. Govt Of Malaysia [1979] 2 MLJ 101 ***(refd)***
Eshah Sa'at v. Meriam Sa'at & Ors [1975] 2 MLJ 97 ***(refd)***
Eu Finance Berhad v. Lim Yoke Foo [1982] 2 MLJ 37 ***(refd)***
Govt Of Malaysia v. Lee Hock Ning [1973] 2 MLJ 51 ***(refd)***
Joseph v. Government Of Sarawak & Anor [1975] 2 MLJ 38 ***(refd)***
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd [1997] 3 CLJ 274 SC ***(refd)***
Manggai v. Government Of Sarawak [1970] 2 MLJ 41 ***(refd)***
O'reilly & Ors v. Mackman & Ors [1983] 2 AL 237 ***(refd)***
Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 ***(refd)***
Pyx Granite Company v. Ministry Of Housing & Local Govt [1960] AC 260 ***(refd)***
Shahruddin Ali & Anor v. Superintendent Of Lands And Surveys Kuching Division & Anor [2004] 4 CLJ 775 HC ***(refd)***
Yahya Kassim v. Kerajaan Malaysia & Anor [1994] 4 AMR 3687 CA ***(refd)***
Harkness v. Bell's Asbestos and Engineering Ltd [1967] 2 QB 729 ***(refd)***

Legislation referred to:
Public Authorities Protection Act 1948, s. 2
Rules of the High Court 1980, O. 53
Sabah Land Ordinance (Cap 68), s. 9(1)

For the plaintiff - Ridwandean Borhan; M/s Ansari & Co
For the 1st defendant - Halim Hanafia; State Attorney General's Chambers
For the 2nd defendant - Francis Chia; M/s Chia & Jinu

Reported by Amutha Suppayah

JUDGMENT

Linton Albert J:

This is an application by the plaintiff who is a successful land applicant for a declaration that the decision of the 1st defendant ordering the plaintiff to compensate the 2nd defendant, an unsuccessful land applicant, and the subsequent decisions of the 1st defendant to withhold registration of the draft title of the land successfully applied for in favour of the plaintiff until payment of compensation amounting to RM900,000 is paid by the plaintiff to the 2nd defendant are unlawful and *void ab initio*. The application was originally sought against the 1st defendant only and was determined in favour of the plaintiff, learned counsel for the 1st defendant having conceded that the 1st defendant did not have the power to make the impugned decisions. The 2nd defendant subsequently applied to intervene and be joined as a party. The application was again allowed and I now give the grounds therefore.

The bone of contention is that parcel of land at Sungai Sabahat, Tungku in Lahad Datu containing approximately 200 acres comprised in the draft title CL 1155411991 (the said land). The sole remaining impediment to the registration of the title to the said land in favour of the plaintiff is the impugned decisions which if looked at closely do not even constitute any impediment at all. The decisions are these:

> Dengan ini diputuskan bahawa kelulusan yang diberikan ke atas permohonan P. T 961110615 (Rajesh Datuk Yusof) adalah dikekalkan. Dengan ini juga, laporan nilai pampasan akan diperolehi daripada Jabatan Pertanian, Lahad Datu dan Bahagian Penilaian, Jabatan Tanah dan Ukur, Kota Kinabalu untuk menetapkan jumlah pembayaran.
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> Adalah juga diputuskan bahawa pampasan yang berkenaan akan dibayar oleh Encik Rajesh Datuk Yusof selaku pemohon P.T. 96110615 kepada Felda sebaik sahaja jumlahnya ditentukan.
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> Dibuat di Kota Kinabalu pada 16 December 1998. (the first decision)
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> ... bahawa nilai pampasan akan dibayar berdasarkan Bahagian Penilaian, Jabatan Tanah dan Ukur, Kota Kinabalu, iaitu RM900,000 seperti dalam surat bil. L.S. 1101.1.4067/57 bertarikh 12 April 1999. Perkara ini telah disampaikan kepada pemohon PT 96110615 menerusi surat pejabat ini bil. LE 61/98/33 bertarikh 14 April 1999.
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> Sehubungan dengan itu, pihak pejabat berpendapat bahawa pendaftaran geran harus ditangguhkan sehingga pembayaran pampasan telah dibayar sepenuhya selaras dengan keputusan perbicaraan tanah di atas untuk mengelakkan sebarang masalah yang akan timbul, di masa akan datang. (the second decision)

It is painfully apparent that the first decision does not make the payment of compensation to the 2nd defendant a condition precedent to the registration of the title in favour of the plaintiff. Hence, the second decision to the effect that registration be withheld pending payment is not only manifestly unfounded but also totally at odds with the first decision which states that the quantum of compensation would be arrived at on the basis of the valuation reports of both the Agriculture Department, Lahad Datu and the Valuation Section of the 1st defendant's Department at Kota Kinabalu, and not, as suggested by the second decision, to be based solely on the latter. The second decision which has since become academic, is thus so unreasonably and manifestly wrong beyond comprehension, a conclusion that perhaps justifies a somewhat minor diversion from the all important issue of whether the 1st defendant is adequately clothed with the authority or power to order the payment of compensation referred to above.

The power of the 1st defendant to alienate land under s. 9(1) of the Sabah Land Ordinance (Cap 68) includes the power to "impose special conditions" to be set out in the title". The condition relating to compensation to the 2nd defendant is not set out in the title which has since been issued and registered in the name of the plaintiff. The only sensible conclusion is that the 1st defendant is not clothed with the power to impose that condition. It stands to reason, that such a condition stemming as it did from the exercise of a power not expressly provided for would be *ultra vires* the Sabah Land Ordinance (Cap 68) and the Land Rules and therefore void. The situation in the instant case is not totally dissimilar to that in *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd* [1997] 3 CLJ 274 where it was held that the powers not expressly provided in the National Land Code conferred upon the receivers and managers under a debenture to sell charged land without resorting to proceedings under the code would be void. Edgar Joseph Jr. FCJ, delivering the judgment of the Supreme Court had this to say at p. 299:

> In our view, the provisions of the Code setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are exhaustive and exclusive and any attempt at contracting out of those rights - unless expressly provided for in the Code - would be void as being contrary to public policy

By the same token, it is not too far-fetched in my view, to hold that the provisions of the Sabah Land Ordinance (Cap 68) and the Land Rules setting out the powers of the 1st defendant are exhaustive and exclusive. The exercise of a power not expressly provided in the Sabah Land Ordinance and the Land Rules would therefore be void.

Learned counsel for the 4th defendant relied heavily on an agreement and a subsequent supplemental agreement made between the 2nd defendant and the Government of Sabah on 4 December 1979 and 18 March 1983 respectively whereby in return for the latter's request to develop 250,000 acres of land in the State of Sabah the former would be entitled to the land so developed alienated to them by the latter and the fact that the said land is part of that 250,000 acres is also not lost on learned counsel. Hence, the elaborate arguments on matters of great import arising from those agreements were advanced on behalf of the 2nd defendant. With respect, these arguments are ill-conceived because of the rule that a party which is not privy to an agreement cannot be prejudiced by the terms thereof. I am also in agreement with learned counsel for the plaintiff's response to the 2nd defendant's reliance on s. 2 of the Public Authorities Protection Act 1948 and I need only to reproduce the relevant part of the learned counsel's written submission which states:

> The Plaintiff is not instituting an action against the act or omission of the 1st Defendant and consequential damages therefrom. What the Plaintiff ask for is a declaration by this honourable court that the decision complained of was made *ultra vires* of the Sabah Land Ordinance 1960.

Clearly the Public Authorities protection Act 1948 does not apply (see *Joseph v. Government Of Sarawak & Anor* [1975] 2 MLJ 38; and *Govt Of Malaysia v. Lee Hock Ning* [1973] 2 MLJ 51).

Finally, I shall dispose of the 2nd defendant's procedural objection to the plaintiff's application. It is argued for the 2nd defendant that the plaintiff's application is an attempt to circumvent the provisions of O. 53 RHC 1980 and this an abuse of the process of the court because the plaintiff ought to have proceeded by way of judicial review for an order of *certiorari* to quash the impugned decision. Concomitant to this argument is the contention that a declaration is futile because it does not quash the impugned decision. Learned counsel for the 2nd defendant also submits that the remedy sought is inappropriate because a remedy is prescribed by the Sabah Land Ordinance (Cap 68) which is by way of an appeal. The plaintiff is also guilty of laches, it is argued, the application having been made five years after the impugned decision. With respect, the authorities cited in support of these contentions have no application to the facts in the instant case. *Shahruddin Ali & Anor v. Superintendent Of Lands And Surveys Kuching Division & Anor* [2004] 4 CLJ 775 concerns the extinguishment of alleged native customary rights under the Sarawak Land Code and the rejection of claims for compensation therefor referred to arbitration under the provisions of the code. It was held that since the alleged native customary rights were acquired, created or recognized in accordance with the Land Code, the remedy to protect or enforce the rights must be sought under public law, by way of O. 53 RHC 1980 and not by

seeking declaratory relief. Hence, the situation here is totally different because the plaintiff is not seeking to enforce or protect a right accorded by the Sabah Land Ordinance. Similarly in *Yahya Bin Kassim v. Kerajaan Malaysia & Anor* [1994] 4 AMR 3687 the appellant's application for a declaration was dismissed because it was an abuse of process to evade the requirements of O. 53 RHC. The decision of the Court of Appeal was premised on what was stated in the headnote in *O'reilly And Others v. Mackman And Other* [1983] 2 AL 237 and reproduced in the judgment of Mahadev Shankar, JCA:

> .... since all the remedies for the infringement of rights protected by public law could be obtained on application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action ...

This case is clearly distinguishable because the plaintiff's application in the instant case for a declaration on the impugned decision does not involve the infringement of the rights protected by public law. In *Manggai v. Government Of Sarawak* [1970] 2 MLJ 41 the matter revolved around the provisions of the Native Courts ordinance (Cap 43) of the Laws of Sarawak, 1958 where the appellant commenced an action in the High Court seeking to declare the decision of the Resident's Native Court granting extension of time a nullity instead of lodging an appeal to the Native Court of Appeal prescribed under the Ordinance. It was held to be unsound in principle to allow a party to come first to the High Court to have the matter resolved when he is compelled by statute to resort to an inferior court. Gill FJ, said at p. 44:

> It is well settled law that the court will not make a declaratory judgment where an adequate alternative remedy is available.

With respect, I am of the view that, that is not an immutable and rigid general principle meant to apply to all cases and certainly not to the instant case where the facts and circumstances are totally different. As to the issue of laches, in *Eshah Binti Sa'at v. Meriam Binti Sa'at & Ors* [1975] 2 MLJ 97, the facts are clearly distinguishable because it involved a question relating to the distribution of the estate of a deceased person where the application was for a declaration that the plaintiff was entitled to a half share in certain lands which formed the estate. Although a lapse of two years was held to have been a considerable delay, Abdul Razak, J had this to say at pp. 97 to 98:

> ... No doubt time unlike in *certiorari* is no bar to a declaration.

In the circumstances the delay of five years is not fatal because here the impugned decision was non-existent; it was a nullity and *void ab initio*.

It seems to me adequate to reproduce the relevant passages in some of the authorities cited by learned counsel for the plaintiff. In *Pyx Granite Company v. Ministry Of Housing & Local Govt* [1960] AC 260 Lord Goddard said:

> I know of no authority for saying that if an order or decision can be attacked by certiorari the court is disbarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive.

and in *Datuk Syed Kechik Bin Syed Mohamad v. Govt Of Malaysia* [1979] 2 MLJ 101 Lee Hun Hoe, CJ Borneo had this to say:

> the prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own descretion.

Abdoolcader, J, delivering the judgment of the Federal Court in *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37 gave a more elaborate explanation:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon - in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, 736, Lord Diplock LJ (now a Law Lord) said (at p. 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'. Where a decision is null by reason of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void.

In *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, Raja Azlan Shah A-G (Malaya) CJ (as His Majesty then was) said:

> In the first place it must be made clear that the existence of a statutory remedy is no bar to an action for a declaration. This case falls within the general principle that the jurisdiction of the High Court is not to be taken away without express words; and this applies to an action for a declaration.

The contentions advanced by learned counsel for the 2nd defendant must fly in the face of the principles set out in the passages above.

I have for the reasons stated allowed the reliefs asked for with costs.